

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF AND
APPENDIX**

77-4034

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4034

CONTINENTAL STOCK TRANSFER & TRUST
COMPANY (A Limited Purpose Trust
Company) and GENERAL STOCK TRANSFER
COMPANY,

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition to Review Order of the
Securities and Exchange Commission

BRIEF FOR PETITIONERS

+ APPENDIX

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On Petition to Review Order of the
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BRIEF FOR PETITIONERS

I. ISSUES PRESENTED

(1) Whether, in light of (a) the objectives and the express provisions of Section 17A of the Securities Exchange Act of 1934 and (b) the provisions of the Freedom of Information Act, the Securities Exchange Act of 1934, and the Securities and Exchange Commission's rules thereunder, the Securities and Exchange Commission erred in refusing to accord confidential treatment to, or otherwise limit public disclosure of, the customer lists filed as Schedule B to Petitioners respective Forms TA-1, "Uniform Form for Registration as a Transfer Agent and for Amendment to Registration as a Transfer Agent Pursuant to Section 17A of the Securities Exchange Act of 1934".

(2) Whether the Securities and Exchange Commission exceeded its authority or otherwise abused its discretion by requiring transfer agents to supply a list of all customers with securities registered pursuant to Section 12 of the Securities Exchange Act of 1934, without regard to materiality or some other qualifying criteria.

The pending case has not been previously before this Court.

II. REFERENCES TO PARTIES AND RULINGS

The order of the Securities and Exchange Commission which is the subject of this Petition to Review is the "Order Granting Petition For Review Under 17 CFR 201.26(c) and Denying Application For Confidential Treatment Under 17 CFR 240.24b-2", dated December 17, 1976.

The names of all the parties in this case are set forth in the caption.

III. STATEMENT OF THE CASE

Petitioners are transfer agents registered as such under the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. §78a et seq.

Pursuant to amendments to the Act resulting from the Securities Acts Amendments of 1975, P.L. 94-29, 89 Stat. 97, the Securities and Exchange Commission (the "Commission") proposed the adoption of Rule 17Ac2-1 and related Form TA-1 under the Act concerning the registration of transfer agents. (Release No. 34-11622, August 28, 1975.) On October 22, 1975 (Release No. 34-11759), the Commission adopted Rule 17Ac2-1 (17 CFR 240.17Ac2-1) and related Form TA-1 (17 CFR 249b.100) under the Act.

Pursuant to the requirements of Section 17A(c) of the Act, 15 U.S.C. §78q-1(c), and Rule 17Ac2-1 thereunder, Petitioners filed their respective Forms TA-1, accompanied by a transmittal letter from Petitioners' counsel dated November 10, 1975. The November 10, 1975 letter requested that "the names of the issuers listed in Schedule B. . . be treated as confidential 'commercial information' and 'trade secrets' in accordance with the provisions of 5 U.S. Code 552(b)(4) and Section 24(b) of the Act." That letter also noted that the requirement that a registrant divulge, potentially for public dissemination, a list of all its customers appeared to be unique to the Form TA-1. Moreover, each Form TA-1 included a cover sheet over Schedule B requesting confidential treatment of the subject information.

As a result of a telephone conversation with a member of the Commission's staff, Petitioners' counsel wrote a second letter, dated November 24, 1975, reiterating the claim for confidential treatment and authorizing the Commission to take certain actions in processing the claim. On December 30, 1975, Petitioners' counsel again wrote to the Commission, inter alia, to confirm that the earlier requests for confidential treatment were being accorded appropriate consideration.

By letter dated July 23, 1976, the staff of the Division of Market Regulation denied the request for confidential treatment. By petition dated August 5, 1976, Petitioners sought review of such denial by the full Commission pursuant to 17 CFR 201.26. By order dated December 17, 1976 (the order here under review), the Commission granted review of the Division of Market Regulation's denial and denied the request for confidential treatment on the grounds that

"(i) Petitioners have failed to demonstrate that the information at issue constitutes trade secrets or privileged or confidential commercial information exempt from disclosure, pursuant to the Freedom of Information Act (5 U.S.C. 552(b)), Section 24 of the Securities Exchange Act of 1934, and the Commission's rules concerning disclosure of records, 17 CFR 200.80(b); and

(ii) Petitioners have failed to conform to the procedures specified under Rule 24b-2, 17 CFR 240.24b-2."

By petition dated December 22, 1976, Petitions requested that the Commission stay its December 17, 1976 order pending judicial review. By order dated January 17, 1977, the Commission granted a stay through February 7, 1977 and on January 27, 1977, Petitioners filed a Petition to Review in this Court pursuant to Section 25 of the Act. Petitioners also requested the Court to stay the Commission's December 17, 1976 order pending a determination of the question on the merits, which stay was granted, subject to certain stipulations as to the time for filing briefs, on February 8, 1977.

IV. ARGUMENT

A. The Commission erred in refusing to accord confidential treatment to, or otherwise limit public disclosure of, the subject customer lists.

1. The Commission failed to give due consideration to the expressed objectives of Section 17A of the Act.

The general objectives of Section 17A of the Act, as set forth in Section 17A(a)(1), 15 U.S.C. §78q-1(a)(1), and in the committee reports relating to the adoption of the Securities Acts Amendments of 1975, P.L. 94-29, 89 Stat. 97, are the creation of a national market system and the development of efficient techniques for the clearance and settlement of securities transactions. See S. Rept. 94-75 (94th Cong., 1st Sess.)(1975); H. Conf. Rept. 94-229 (94th Cong., 1st Sess.)(1975). In particular, it was stated that the

"Commission is empowered with broad rulemaking authority over all aspects of a transfer agent's activities as transfer agent. [Citation omitted.] The Committee expects this to include, among other matters, minimum standards of performance, the prompt and accurate processing of securities transactions, and operational compatibility of and cooperation by transfer agents with other facilities and participants in the securities handling process." S. Rept. 94-75, supra at 57.

Elsewhere in its report, the Senate Banking, Housing and Urban Affairs Committee again emphasizes that the authority to regulate transfer agents being delegated to the Commission was intended primarily to correct operational and paperhandling problems through the creation of a "central authority in operational matters" and thereby enhance the development of the desired efficiency in securities transactions. S. Rept. 94-75, supra at 53-55.

Moreover, Section 17A(a)(2) of the Act, 15 U.S.C. §78q-1(a)(2), directs the Commission, in exercising its authority under Section 17A, to have "due regard" for, inter alia, the "maintenance of fair competition among. . . transfer agents".

In light of the legislative history of the Securities Acts Amendments of 1975 and the express objectives of Section 17A, it is far from clear that the Commission is even authorized to require a transfer agent to include in its registration statement a complete listing of the issuers for whom it acts as transfer agent, an issue to be discussed in greater depth elsewhere in this brief (see pp. 23-27). However, even assuming that the Commission is justified in collecting this information for its own use, the public dissemination of these customer lists is totally unwarranted and flies in the face of the express directives of Section 17A.

The public disclosure of every transfer agent's customer list can in no way serve to further the legislative purpose of correcting the operational and paperhandling

problems encountered in the course of effecting securities transactions. Cf. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976) (The FPC should have considered whether the disclosure of the information there involved would significantly aid the FPC in fulfilling its functions.) Accordingly, even absent the express language of Section 17A(a)(2), there is no legislative foundation for requiring such disclosure.

When this lack of authority is compounded by the directive to have due regard for competition, it becomes apparent that the Commission's order denying confidential treatment to this information cannot be upheld. Disclosure of a compilation of all of a transfer agent's customers, particularly those of a relatively small, independent transfer agent in competition with massive institutions, not only does not demonstrate due regard for the maintenance of fair competition among transfer agents, but, rather, seems designed to destroy any chance the small transfer agent may have to compete effectively. The competitive advantages already enjoyed by the institutional transfer agents because of their size and market acceptance will be greatly enhanced by this detailed knowledge of their smaller competitors' customer lists. Indeed, when one considers the leverage possessed by large banks with transfer agent departments, the potential anti-competitive aspects of the required public disclosure of these customer lists are patent. Moreover, these anti-competitive effects will not be offset by the disclosure

of the banks' customer lists to the smaller transfer agents who do not possess the banks' financial leverage and who are scarcely in a position to challenge such institutions.

2. The Freedom of Information Act, Section 24(b) of the Act and the Commission's rules thereunder mandate that the subject customer lists be accorded confidential treatment.

Section 24(b) of the Act, 15 U.S.C. §78x(b), declares that "[i]t shall be unlawful for any member, officer, or employee of the Commission to disclose to any person. . . any information contained in any application. . . or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code. . . ."

The Act, then, by its terms, requires that requests for information from the Commission be governed by the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 et seq. See S. Rept. 94-75 (94th Cong., 1st Sess) (1975) at 136-137. Indeed, the rules of the Commission adopted under the FOIA, in pertinent part, track the language of the FOIA. Thus, 17 CFR §200.80(b)(4) provides that the Commission will generally not publish or make available to any person matters that are "[t]rade secrets and commercial

or financial information obtained from a person and privileged or confidential". This exemption found in the Commission's own rules is, of course, identical to that contained in the FOIA itself, 5 U.S.C. §552(b)(4). Accordingly, one must look to the FOIA for guidance in the interpretation of this exemption from the requirements of disclosure.

The exemption in the FOIA for trade secrets and commercial or financial information was intended to protect the competitive position and the privacy of citizens who submit such information to the Government. See Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970). As explained by the Senate Committee on the Judiciary which reported on the bill,

"This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes." (Emphasis added.) S. Rept. 813 (89th Cong., 2d Sess.) (1965) at 9. See, also H. Rept. 1497 (89th Cong., 2d Sess.) (1965) at 10.

In analyzing this exemption from the application of the FOIA, the Justice Department reiterated the above-stated Congressional intent when it established agency guidelines for dealing with commercial information:

"It seems obvious from these Committee reports that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the Congressional intention as expressed in the committee reports. . . .

"In view of the statements in both committee reports that the exemption covers material which would customarily not be released to the public by the person from whom the government obtained it, there may be instances when agencies will find it appropriate to consult with the person who provided the information before deciding whether the exemption applies." Attorney General's Memorandum on the Freedom of Information Section of the Administrative Procedure Act, U.S. Department of Justice (1967), at p. 34 (Emphasis added.).

Moreover, the legislative intent behind the FOIA has been recognized and applied on numerous occasions. In Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970), an aerospace contractor sought an order compelling the Board to produce orders and opinions issued during the renegotiations of contracts of 14 companies during the years 1962 to 1965. It was held that the orders and opinions would be released only after the confidential data had been deleted from the documents. In reaching this decision the court relied on the theory supporting the exemption in 5 U.S.C. §552(b)(4), stating (425 F.2d at 580) that this section was designed

"to prevent the unwarranted invasions of personal property which might be caused by the government's indiscriminate release of confidential information."

The holding in Grumman was reiterated in Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971), where a litigant in a proceeding before the Federal Trade Commission sought disclosure of documents relating to a prior merger case. Again, it was held that the documents would be disclosed only after the confidential information had

been deleted, the court stating that the essential question in applying 5 U.S.C. §552(b)(4) to documents is whether the information sought is a type "which would customarily not be released to the public by the person from whom it was obtained." See, also, Porter County Chapt etc. v AEC, 380 F. Supp. 630, 634, 636 (N.D. Ind. 1974).

Perhaps the most extensive discussion of this exemption can be found in National Parks and Conservation Asso. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). As noted there, 5 U.S.C. §552(b)(4) has two distinct purposes. The first, which relates to encouraging cooperation with the Government by persons having useful information, is not directly involved here. The second purpose, however, is to protect the rights of those who are required to provide certain information to the Government. The exemption, then, "may be applicable even though the Government itself has no interest in keeping the information secret." (498 F.2d at 770.)

Moreover, according to the National Parks court, "[i]n order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." (498 F.2d at 766.) Since, for the purposes of the FOIA, a corporation comes within the definition of person, 5 U.S.C. §551(2), Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975), cert. denied,

____ U.S. ____ 96 S. Ct. 2168, 48 L.Ed. 2d 794 (May 18, 1976), and since the customer lists here in dispute constitute commercial or financial information (see the earlier discussion of the legislative history of the FOIA), the dispute comes down to whether the information is confidential. And, as stated in National Parks,

"[C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (498 F.2d at 770.)

As noted above (see pp. 8-9), the harm to Petitioners' competitive position that will result from public dissemination of this information is clear and substantial. In light of the size and power of certain institutional transfer agents, it is not hard to imagine that disclosure of these customer lists will result in the smaller, independent transfer agents, such as Petitioners, being driven out of business. Consequently, the information here in question falls within the National Parks' definition of "confidential" information.

In spite of the fact that the customer lists which are the subject of this dispute are encompassed within the FOIA definition of "confidential information", the Commission is apparently prepared to argue that the lists are nonetheless not entitled to confidential treatment. The basis for

the Commission's argument appears to be its view that the information is already a matter of public knowledge.

There would seem to be no dispute that Petitioners customarily hold such lists in confidence and do not customarily make them available to the public. Cf. Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); Porter County Chapter etc. v. AEC, 380 F. Supp. 630, 634 (N.D. Ind. 1974). Indeed, the extent to which Petitioners have been willing to pursue this matter with the Commission and this Court would seem to be ample evidence of their desire to maintain the confidentiality of this information.

Furthermore, the fact that the information contained in these customer lists may be available in a piecemeal fashion, such as through stock certificates and annual reports, cannot preclude the treatment of the compiled list as "confidential". There is a difference in kind between the availability of information from individual issuers as to their transfer agents and the availability of a list of all customers of a transfer agent. Such a quantum leap, with its potentially disastrous competitive consequences, should not be permitted under the guise of a registration provision.

Thus, the Commission's argument that this information is already publicly available and therefore not entitled to confidential treatment must rely on the existence of certain publications such as The Financial Stock Guide

Service Directory of Active Stocks ("FSGS") published by Financial Information, Inc., and the CCH Stock Transfer Guide Directory ("CCH"), published by Commerce Clearing House, Inc. However, before discussing the question of the accuracy of these publications, two observations are in order.

First, these publications are arranged according to issuer and therefore are not the equivalent of a listing of customers by transfer agent. Indeed, it would seem to require a massive investment of time, money and energy to convert these publications into transfer agent by transfer agent customer lists. Whether or not such an effort is even practicable, the Commission should not be in business of performing the task for Petitioners' competitors. Should such competitors desire to attempt the transformation with the attendant manpower investment required, they are free to do so. The fact that (aside from questions of accuracy) such a transformation may be theoretically possible is no reason to have the Government (in the form of the Commission) entering the arena and providing transfer agents with their competitors' ready-made customer lists, particularly in light of the likely substantial harm to the competitive position of the smaller, independent transfer agents vis a vis the institutional transfer agents. (See pp. 8-9 and 13.) Almost any information can be obtained with the expenditure of sufficient time, money and energy, and consequently, the Commission's theory would presumably preclude

confidential treatment of any commercial or financial information, a patently unacceptable result.

Second, it must be emphasized that the information contained in these publications was presumably supplied by the issuers and not by the transfer agents themselves. Therefore, there can be no contention that Petitioners have participated in the compilation of these publications and somehow waived their right to claim confidentiality.

It is of primary importance in considering the effect that publications such as FSGS and CCH have on Petitioners' claims to realize that these publications are far from 100% accurate, complete and reliable. On the contrary, they contain numerous omissions and errors. Indeed, Petitioners' review of FSGS indicates that that publication fails even to list many of the issuers for whom Petitioners act as transfer agent and also lists certain of Petitioners' customers as having a transfer agent other than one of the Petitioners. CCH, for its part, fails to list over 50% of the issuers for whom Petitioners act as transfer agents. (There are likely to be additional errors resulting from the listing of an issuer as having one of the Petitioners as its transfer agent when in fact some other entity acts as transfer agent for that issuer. It was felt to be too time consuming to pursue this possible source of errors.) Even if Petitioners' competitors could construct transfer agent by transfer agent customer lists from FSGS and CCH, these error factors would

afford some cushion of protection to Petitioners. It is not the job of the Commission to correct the errors in publications such as FSGS and CCH and thereby ensure the public availability of 100% reliable information as to Petitioners' customers.

In any event, it is difficult to see how the existence of error-ridden publications containing voluminous information arranged by issuer (and presumably supplied by the issuers) can be used as the basis for claiming that complete and accurate customer lists required to be filed by transfer agents with the Government are not confidential and should therefore be available for public inspection.

The Commission also is apparently prepared to argue that even if the subject information falls within the exemption from disclosure for trade secrets or privileged or confidential commercial or financial information, it is still not prohibited from disclosing the information, relying primarily on Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). In spite of the dicta in Charles River supporting that proposition, the matter appears never to have been decided by this Court. Moreover, other and, it is respectfully submitted, better reasoned decisions have rejected comparable arguments. For example, in Continental Oil Co. v. FPC, 519 F.2d 31, 35 (D.C. Cir. 1975), cert. denied, _____ U.S. _____, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (May 18, 1976), the court had the following view of the matter:

"The FPC urges that the exemption means no more than that an agency cannot be compelled to release confidential information, and does not command that they must withhold it. We hold, without reaching any situation broader than that presented, that this contention is without merit here. National Parks and Conservation Ass'n. v. Morton decided that even where an agency had no interest in keeping submitted information secret, '[t]he exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position.' 498 F.2d at 770." See, also, Sonderegger v. Dept. of the Interior, 45 L.W. 2327 (D.C. Idaho, 12/17/76).

Moreover, regardless of whether or not the Commission is correct of its interpretation of the FOIA, Section 24(b) of the Act makes it unlawful for the Commission to disclose any information in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code, pursuant to which rules the Commission has decreed that it will generally not disclose matters that are "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential". 17 CFR §200.80(b)(4). (See pp.9-10.) Thus, assuming that these customer lists do fall within the terms of the exemption, the Commission is bound to follow its own rules and consequently has no discretion to disclose the lists; their confidentiality must be maintained. See Accardi v. Shaughnessy, 347 U.S. 260 (1954); Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Ry. Co., 284 U.S. 370 (1932); NLRB v. United Brotherhood of Carpenters, 261 F.2d 166 (7th Cir. 1958).

Finally, disclosure of this information will serve no useful public purpose and a balancing of public and private interests is a necessity in interpreting the FOIA. Evans v. Dept. of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972). Public investors will not benefit from such disclosure since the identity of the transfer agent for any security they own is readily obtainable from the stock certificate or the issuer. Even if this were not the case, the availability at the Commission's Washington offices of voluminous lists of issuers, arranged by transfer agent, could scarcely be a useful tool for a member of the public seeking the identity of the transfer agent for a security he owns.

Even if there are certain public benefits to be derived from disclosure of this information in some form, a contention with which Petitioners cannot agree, the Commission is obligated to determine whether there are alternatives to full disclosure. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976). Such alternatives might include composite or summary disclosure or disclosure in some other manner which would ensure confidentiality. See Continental Oil Co. v. FPC, 519 F.2d 31, 36 (5th Cir. 1975), cert. denied, _____ U.S. _____, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (May 18, 1976).

In sum, then, the FOIA, the Act itself and the Commission's rules thereunder prohibit full public disclosure of Petitioners' customer lists.

3. Petitioners' substantial compliance with the procedures specified in Rule 24b-2 under the Act and the Commission's acquiescence in the procedures employed preclude the Commission from relying on that Rule as a basis for its denial of confidential treatment.

Rule 24b-2, 17 CFR 240. 24b-2, was proposed on October 30, 1975 (Release No. 34-11774), only a few days before Petitioners' respective Forms TA-1 were filed, and was adopted on April 28, 1976 (Release No. 34-12386). Petitioners substantially complied with the procedures prescribed in the Rule in requesting confidential treatment for their customer lists. Nonetheless, the Commission's December 17, 1976 order cites as one basis of its denial of confidential treatment that "Petitioners' original request for confidential treatment did not meet procedural requirements, in that Petitioners did not physically segregate the information for which confidentiality was requested and did not, in our judgment, offer a sufficient discussion of the grounds and justification for an exemption from disclosure."

Although Petitioners admittedly did not physically segregate the customer lists, there could have been no confusion as to what material was intended to be kept

confidential. Schedule B is in and of itself separable from the remainder of the Form TA-1 and each page was clearly marked "CONFIDENTIAL". In addition, the November 10, 1975 transmittal letter which accompanied the filings unequivocally requested confidential treatment for "the issuers listed in Schedule B". Moreover, there was a similar unequivocal statement contained on a special cover page which Petitioners included with each Schedule B.

Both the November 10, 1975 transmittal letter and the aforementioned cover page cited as a basis for the claim of confidentiality that the information constituted trade secrets or privileged and confidential commercial or financial information, the transmittal letter even citing "5 U.S. Code 552(b)(4) and Section 24(b) of the Act." Considering the prima facie inclusion of customer lists within the terms of 5 U.S.C. §552(b)(4) (see p. 10), these statements should constitute a sufficient statement of the grounds relied on for the exemption. Certainly, the Commission had due notice of Petitioners' position.

That there was no confusion on the Commission's part is demonstrated by the fact that there was at least one telephone conversation between Petitioners' counsel and a member of the Commission's staff relating to the request for confidential treatment. This conversation resulted in the November 24, 1975 letter from Petitioners' counsel reiterating the basis for the claim of confidentiality and authorizing

the Commission to perform the ministerial and hardly time-consuming task of physically removing the already clearly distinguished Schedules B from the remainder of the Forms TA-1. The letter concluded with a request that the Commission communicate with Petitioners' counsel if there were any problems concerning the letter. No such communication was received.

On December 30, 1975, Petitioners' counsel again wrote to the Commission to confirm that the November 24, 1975 letter, in conjunction with the November 10, 1975 letter, constituted a sufficient request for confidential treatment. Again, no communication on the matter was received from the Commission.

Since Rule 24b-2 had only been very recently proposed at the time, and since Petitioners had substantially complied with its terms, and since, as a result of extensive communications between Petitioners' counsel and the staff, there could have been no confusion on the Commission's part as to the material deemed confidential or the basis for the claim, the Commission should not be permitted to deny confidential treatment because of some purported, technical noncompliance with procedures with which it had tacitly concurred.

A decision with such potentially severe adverse competitive consequences (see pp. 8-9 and 13) should not be based on so flimsy a support.

B. The Commission exceeded its authority or otherwise abused its discretion by requiring transfer agents to supply a list of all customers with securities registered pursuant to Section 12 of the Act, without regard to materiality or some other qualifying criteria.

"[T]here is no place in our constitutional system for the exercise of arbitrary power". Garfield v. United States ex rel. Goldsby, 211 U.S. 249, 262 (1908). See, also, ICC v. Louisville & N.R.R., 227 U.S. 88, 91 (1913) (The Constitution condemns "all arbitrary exercise of power.") Accordingly, to the extent that the Commission has acted arbitrarily in adopting Form TA-1, and in particular, in requiring transfer agents to include as part of the Form a list of all customers with securities registered pursuant to Section 12 of the Act, the Commission's action is reviewable by this Court. See, generally, Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965, 966 (1969) and cases cited at Notes 10 and 11. See, also, Section 10 of the Administrative Procedure Act, 5 U.S.C. §706. ("The reviewing court shall . . . (2) hold unlawful and set aside agency action. . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .")

As noted elsewhere in this brief (see pp. 6-7), the objectives of Section 17A of the Act, pursuant to which the

Commission has adopted Rule 17Ac2-1 and related Form TA-1, are the creation of a national market system and the development of efficient techniques for the clearance and settlement of securities transactions. See, also, SEC Release No. 34-11759 (October 22, 1975). In particular, it was hoped that Section 17A would lead to the correction of various operational and paperhandling problems encountered in the clearance and settlement of securities transactions. S. Rept. 94-75 (94th Cong., 1st Sess.)(1975) at 53-55.

Given this legislative intent, there appears to be no basis for the Commission's requirement that a transfer agent list all of its customers with securities registered pursuant to Section 12 of the Act. Nonetheless, such a list is required by Item 7 of Form TA-1 and Petitioners' respective Schedules B filed in response to this Item are the subject of this controversy.

Any information which the Commission gleans from the various Schedules B filed in response to Item 7 and which is useful in achieving the stated goals of Section 17A could be obtained without requiring disclosure of the identity of all of a transfer agent's customers. Summary disclosure of the number of issuers and kinds of securities for which an entity acts as transfer agent (or any other disclosure short of a list of all customers by name) would provide the Commission with sufficient information and data to pursue the limited objectives of Section 17A. Knowledge of the identity

of each customer is irrelevant for the Commission's purposes and adds nothing of value to its files.

In addition, this court "must satisfy itself that the administrative decision has a 'rational' or 'reasonable' foundation in law." Grace Line v. Federal Maritime Bd., 263 F.2d 709, 711 (2nd Cir. 1959). See, also, Mississippi Valley Barge Co. v. United States, 292 U.S. 282, 286-87 (1934); Gilbertville Trucking Co. v. United States, 371 U.S. 115, 126 (1962). Furthermore, the Court "must consider whether the decision was based on a consideration of the relevant factors. . . ." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See, also, Papercraft Corp. v. FTC, 472 F.2d 927, 932 (7th Cir. 1973) (A court cannot properly perform its reviewing function unless the basis for the administrative action is adequately explained.)

However, neither in the release adopting Form TA-1 (Release No. 34-11759 (Oct. 22, 1975)) nor in any other writing has the Commission stated its reasons for requiring transfer agents to file these extensive customer lists. The closest that the Commission comes is a statement in the adopting release that

"[t]he Form is designed to identify, and to provide the Commission with basic information regarding, the size and nature of the registrant's transfer agent activities and to assist in the development of appropriate regulatory standards."

Not only does this not constitute a sufficient statement of

the grounds for the decision but, as noted above, that basic information could have been provided without requiring the transfer agent to list, by name, substantially all of its customers. The inadequacy of the Commission's explanation for its actions, compounded by the absence of a legislative foundation therefor, precludes the upholding of the Commission's action requiring these customer lists. National Nutritional Foods Asso. v. Weinberger, 512 F.2d 688, 701 (2nd Cir. 1975), cert. denied, 423 U.S. 827 (1975).

Moreover, the requirement that registering transfer agents list all of their customers (subject to the qualifying criterion of having a security registered under Section 12 of the Act), regardless of the materiality of any customer to the registrant's business, is at odds with the Commission's accepted practice in administering the various federal securities laws. For example, a registrant using Form S-1, 17 CFR 239.11, under the Securities Act of 1933, 15 U.S.C. §77a et seq., is required to list only "material" customers (Item 9(a)(2)) and to file as an exhibit only "material" contracts. See Instruction 13 as to Exhibits to Form S-1. Similarly, a registrant filing a Form 10, 17 CFR 249.210, under Section 12 of the Act is required to list only "material" customers (Item 1(b)(2)) and to file as an exhibit only "material" contracts. See Instruction 9 as to Exhibits to Form 10. Indeed, Form BD, 17 CFR 249.501, the form used for the registration of broker-dealers under the Act, a

group subject to pervasive regulation by the Commission, does not require any listing of customers. In sum, it appears that no other entity is required to file with the Commission information comparable to that required from transfer agents by Item 7 of Form TA-1.

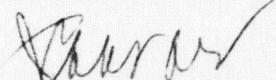
When an agency such as the Commission unreasonably deviates from long-standing policy (as it has done by requiring these detailed customer lists) and does not articulate the reasons justifying the change in policy, such action is beyond the bounds of discretionary authority and constitutes unlawful, arbitrary action. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970) (The court should consider "whether the Commission has sufficiently identified and articulated its reasons for" deviating from prior policy.).

Thus, the lack of a legislative basis for requiring transfer agents to file detailed customer lists, the failure to give an explanation for the decision, and the deviation from established practice warrants a finding that the Commission's action in requiring this information was arbitrary, capricious and beyond its authority.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court set aside the Commission's December 17, 1976 order with instructions to the Commission to accord the subject information confidential treatment, or alternatively, to find that the Commission exceeded its authority in requiring Petitioners to file such information with instructions that such information may therefore not remain in the Commission's files.

Respectfully submitted,



JESSE R. MEER
MARC B. LASKY

Berlack, Israels & Liberman
26 Broadway
New York, New York 10004

Attorneys for Petitioners

SECURITIES EXCHANGE ACT OF 1934

Section 17A. (a)(1) The Congress finds that —

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(2) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this title to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempted securities) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. The Commission shall use its authority under this title to assure equal regulation under this title of registered clearing agencies and registered transfer agents.

*

*

*

(c)(1) Except as otherwise provided in this section, it shall be unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent

with respect to any security registered under section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsection (g) (2) (B) or (g) (2) (G) of that section. * * *

(2) A transfer agent may be registered by filing with the appropriate regulatory agency for such transfer agent an application for registration in such form and containing such information and documents concerning such transfer agent as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section. * * *

Section 24(b)

(b) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information. Nothing in this subsection shall authorize the Commission to withhold information from the Congress.

FREEDOM OF INFORMATION ACT

5 U.S.C. §552(b) (4)

This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and confidential.

17 CFR 200.80(b)

[T]he Commission will generally not publish or make available to any person matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .

17 CFR 240.17Ac2-1

[A]pplication for registration, pursuant to Section 17A(c) of the Act, of a transfer agent. . . shall be filed with the Commission on Form TA-1. . . .

Item 7(a) of Form TA-1

In accordance with Instruction 19, list on Schedule B issues serviced as transfer agent in the following capacities, as these terms are commonly used in the transfer agent industry: transfer agent, co-transfer agent, registrar or co-registrar.

Instruction 19 to Form TA-1

Item 7(a) - At the option of registrant, the response to this item may be limited to "issues" or "securities" registered under Section 12 of the Act or which would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of Section 12 of the Act.

BERLACK, ISRAELS & LIBERMAN
26 BROADWAY
NEW YORK 10004
248-6900 CABLE: BERLIB

REC'D - N.E.C.

NOV 11 1975

November 10, 1975

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CHARLES S. CORBEN
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PAUL H. BARIS
ZANE KLEIN
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(202) 393-2000

Securities and Exchange Commission
Washington, D. C. 20549

Re: Continental Stock Transfer & Trust
Company (A Limited Purpose Trust
Company)

General Stock Transfer Company

Dear Sirs:

Pursuant to Section 17A of the Securities Exchange Act of 1934 (the "Act"), we enclose herewith six copies of Form TA-1 for each of the above-named applicants for registration.

We refer to paragraph 22 of the General Instructions, which states that information supplied on Form TA-1 will be included routinely in the public files of the appropriate regulatory agency and will be available for inspection by any interested person. On behalf of the applicants, we hereby request that the names of the issuers listed in Schedule B, which is being submitted as part of Item 7(a) of each of the Forms filed herewith, be treated as confidential "commercial information" and "trade secrets" in accordance with the provisions of 5 U.S. Code 552(b)(4) and Section 24(b) of the Act. (We do not consider that the paragraph entitled "Statutory Basis and Competitive Considerations" in Release No. 11759 issued under the Act on October 22, 1975 was intended to, or does as a matter of law, deprive the applicants of their rights to request confidentiality under the Act or the Administrative Procedure Act.)

The applicants believe that public disclosure of the identity of their customers (without regard to their materiality) will have a harmful effect on their business and is unnecessary for the purposes of Section 17A of the Act. We are not aware

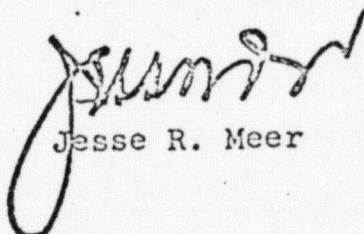
Securities and Exchange Commission
Page 2

of any statute or regulation administered by the Commission which requires that all of a registrant's customers be named in the applicable registration form which would then be subject to public inspection. Thus, no issuer under the Securities Act, no broker-dealer under the Act, no mutual fund under the Investment Company Act and no holding company under the Public Utility Holding Company Act is required to divulge comparable information for public inspection.

Under Release No. 11759, it would appear that the Commission intends to enter orders making the enclosed applications for registration effective on December 1, 1975 without any affirmative action by the applicants. Accordingly, the enclosed applications are not accompanied by requests for acceleration.

Please be good enough to acknowledge the Commission's receipt for filing of the above-described applications for registration by stamping and returning to the undersigned in the stamped self-addressed envelope the enclosed duplicate copy of this letter of transmittal.

Very truly yours,



Jesse R. Meer

NOV 11 1975

List issues serviced as transfer agent, co-transfer agent, registrar, or co-registrar. For each issue provide the following information:

(See Instructions 19, 20 and 21 before completing this Schedule)

1. Full name of Registrant exactly as stated in Item 2 (a) of Form TA-I.

CONTINENTAL STOCK TRANSFER & TRUST COMPANY. (A LIMITED PURPOSE TRUST COMPANY)

Capacity or Capacities
In which registrant
acts for issue
CHECK THE
APPROPRIATE
COLUMN(S):

Name of Issuer

Issue

CUSIP
Number

(If Applicable)

Transfer Agent	✓
Co-transfer Agent	✓
Registrar	✓
Co-Registrar	✓

THE INFORMATION REQUIRED BY THIS SCHEDULE IS	CONSIDERED
BY THE APPLICANT AS CONFIDENTIAL AND IS BEING OMITTED	
PURSUANT TO RULE 24b-2 UNDER THE SECURITIES EXCHANGE ACT	
OF 1934. SUCH INFORMATION IS BEING FILED SEPARATELY WITH	
THE SECURITIES AND EXCHANGE COMMISSION UNDER SAID RULE	
TOGETHER WITH AN APPLICATION MAKING OBJECTION TO ITS	
DISCLOSURE.	

Is is: A Registration Form



This is: An Amendment



If this is an amendment,
CHECK ONE

OFFICIAL
USE ONLY

This is an
addition to
issues or capaci-
ties previously
listed on
Schedule B

This is a
deletion of
issues or capaci-
ties previously
listed on
Schedule B

CS

REC'D - S.E.C.

NOV 26 1975

TH

CHECK THE
APPROPRIATE
COLUMN(S):

Co-Registrar.

11 For purposes of this Schedule B, the terms transfer agent and co-transfer agent include the person performing similar functions with

is is: A Registration Form



This is: An Amendment



If this is an amendment,
CHECK ONE

OFFICIAL
USE ONLY

This is an
addition to
issues or capaci-
ties previously
listed on
Schedule B

This is a
deletion of
issues or capaci-
ties previously
listed on
Schedule B

07

REC'D - S.E.C.

NOV 26 1975

REC'D - S.E.C. 1 of 2

NOV 26 1975

BERLACK, ISRAELS & LIBERMAN

26 BROADWAY

NEW YORK 10004

248-6900 CABLE: BERLIB

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(202) 393-2080

November 24, 1975

Harry Melamed, Esq.
Special Counsel
Division of Market Regulation
Securities and Exchange Commission
Washington, D. C. 20549

Re: Continental Stock Transfer & Trust
Company, A Limited Purpose Trust
Company: Form TA-1

General Stock Transfer Company: Form TA-1

Dear Mr. Melamed:

This morning I spoke to Mr. Jules Moskowitz of your office in connection with the above-named companies' filings. In particular, we discussed the request made by my letter of transmittal dated November 10, 1975 (which the Commission acknowledged receiving on November 11, 1975) for confidential treatment of the information submitted on Schedule B as part of Item 7(a) of each of the applications for registration. The requests were made pursuant to provisions of 5 U.S. Code 552(b)(4) and Section 24(b) of the Securities Exchange Act of 1934.

Although Mr. Moskowitz had initiated a call to the applicants last week regarding their requests for confidential treatment (based upon the legend "Confidential" affixed by the applicants to their Schedules B), unfortunately he was unaware of my letter of transmittal making and setting forth the grounds for the request. Mr. Moskowitz took the position that the request for confidential treatment is now governed by Exchange Act Release No. 11774 dated October 30, 1975 and the new rules of the Commission thereunder. He also stated that to claim the right of confidential treatment, we must retrieve the filings made on November 11th and then refile the same material in two separate packages; one, the entire application minus Schedule B, and the other, merely

REC'D - S.E.C.

NOV 26 1975

Harry McLamed, Esq.
Page 2

Schedule B. This seems to me to be an inordinate waste of the Commission staff's manpower and the time and energy of the applicants. It would seem to me to be sufficient for the staff, in reliance upon this letter, to:

(a) Physically remove Schedule B from each of the applications on Form TA-1 filed with the Commission on November 11, 1975.

(b) Insert in lieu thereof the enclosed Schedule B for each applicant. (The enclosed Schedule states that the prescribed information has been omitted and is being filed separately with the Commission pursuant to its Rule 24b-2 under the Securities Exchange Act of 1934.)

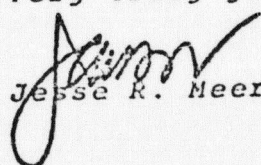
(c) Add the word "TREATMENT" to the Schedule B of each filing removed as directed in (a) above (the word "CONFIDENTIAL" is already clearly marked on each Schedule) and treat each such Schedule as filed under paragraph (b) (1) of the Rule.

(d) Treat my letter of November 10, 1975 as the application contemplated by paragraph (b) (2) of the Rule in that it (i) identifies the portion of the material for which confidential treatment is being requested, and (ii) states the grounds for the request under the applicable provisions of the Freedom of Information Act, namely, that the names of the applicants' customers constitute "commercial information" and "trade secrets" under 5 USCA Sec. 552(b) (4).

(e) Accept this letter as the applicants' consent in writing to the furnishing of Schedule B of each application to other governmental agencies, bodies, offices and to the Congress and as notice that neither the applications nor the confidential portions thereof have been filed with any national securities exchange.

Please direct all further comments concerning this letter and the subject matter to the undersigned.

Very truly yours,


Jesse R. Meer

JRM/hsk

cc: Mr. Michael Nelson

BERLACK, ISRAELS & LIBERMAN

26 BROADWAY

NEW YORK 10004

SECURITIES AND EXCHANGE COMMISSION

248-6900 CABLE: BERILIB

RECEIVED

JAN 2 1976

OFFICE OF THE

December 30, 1975

JAMES B. LIBERMAN
CHARLES S. CORBEN
JESSE H. MEER
PAUL H. BARRIS
ZANE KLEIN
IRA H. JOLLES
LEONARD EPSTEIN
KENNETH R. ASHER

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Harry Melamed, Esq.
Special Counsel
Division of Market Regulation
Securities and Exchange Commission
Washington, D. C. 20549

Re: Continental Stock Transfer & Trust Company,
A Limited Purpose Trust Company: Form TA-1

General Stock Transfer Company: Form TA-1

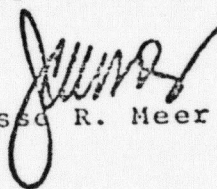
Dear Mr. Melamed:

I refer to my letter to you dated November 24, 1975.

Inasmuch as I have not heard from you or Mr. Moskowitz relative to that letter or its subject matter, I am assuming that the suggestions made therein comport with the request for confidential treatment made in my original letter of transmittal of November 10, 1975.

In addition, since we have not heard further from the Chief of the Branch of Broker-Dealer and Investment Advisor Registration (to which the above-referenced applications for registration have been assigned), we are assuming that the applications for registration of the above-named transfer agents became effective on December 1, 1975. However, we have not received a copy of that order.

Very truly yours,


Jesse R. Meer

JRM/hsk

cc: Mr. Michael Nelson

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED



DIVISION OF
MARKET REGULATION

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 23, 1976

Jesse R. Meer, Esq.
Berlack, Israels & Liberman
26 Broadway
New York, New York 10004

Dear Mr. Meer:

This is in response to your letter of November 10, 1975, in which you enclose the Forms TA-1 of Continental Stock Transfer & Trust Company and General Stock Transfer Company (the "Registrants") and in which you request, pursuant to Section 24(b) of the Securities Exchange Act of 1934 and Rule 24b-2 (17 CFR 240.24b-2) thereunder, that confidential treatment be afforded to the names of the issuers listed in Registrants' Schedules B of their respective Forms TA-1; to your letter of November 24, 1975, in which you request the staff to make specified alterations and substitutions to the Registrants' Forms TA-1 so that appropriate consideration may be given to your requests for confidential treatment; and to your letter of December 30, 1975, inquiring as to the disposition of your earlier requests. In your letter of November 10, 1975, you indicate that the names of the issuers listed in the Schedules B should "be treated as confidential 'commercial information' and 'trade secrets' in accordance with the provisions of 5 U.S. Code 552(b)(4) and Section 24(b) of the Act."

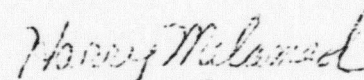
The Division has reviewed your request for confidential treatment on behalf of the Registrants. Based upon our review of your request, the Division has determined that you have not complied with the procedures set forth in Rule 24b-2 as proposed or adopted (See Securities Exchange Act Release Nos. 11774 and 12386) and that the names of the issuers listed in Registrants' Schedules B do not qualify for confidential treatment pursuant to Rule 24b-2 under the Act. The Division is of the view that this information is not a trade secret or commercial information which is privileged or confidential under 17 CFR 200.80(b)(4). Accordingly, your request for confidential treatment has been denied by the Division pursuant to delegated authority, and

Jesse R. Meer, Esq.
Page Two

this information will be placed in the public files five days after the date of this letter unless, within five days after the date of this letter, you communicate to the Secretary of the Commission a notice of intention to petition for review by the Commission under 17 CFR 201.26. If you petition for review pursuant to 17 CFR 201.26, no disclosure of this information will be made until such Commission review has been completed.

If you have any questions regarding this matter, please contact us.

Sincerely,



Harry Melamed
Assistant Director

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
December 17 1976

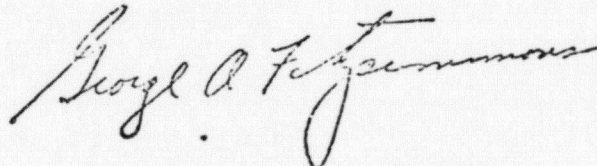
In the Matter of the Petition of	:	
CONTINENTAL STOCK TRANSFER & TRUST	:	
COMPANY (A Limited Purpose Trust	:	ORDER GRANTING PETITION
Company)	:	FOR REVIEW UNDER 17 CFR
	:	201.26(c) AND DENYING
and	:	APPLICATION FOR CON-
	:	FIDENTIAL TREATMENT
GENERAL STOCK TRANSFER COMPANY	:	UNDER 17 CFR 240.24b-2
Section 24(b)	:	
<u>Securities Exchange Act of 1934</u>	:	

Continental Stock Transfer and Trust Company and General Stock Transfer Company ("Petitioners") have made written objection to public disclosure of the names of the issuers for whom they act as transfer agents, which they disclosed to the Commission in Schedules B of Forms TA-1, "Uniform Form for Registration as a Transfer Agent and for Amendment to Registration as a Transfer Agent Pursuant to Section 17A of the Securities Exchange Act of 1934." The Division of Market Regulation, acting pursuant to authority delegated to it by the Commission under 17 CFR 200.30-3(a)(20)(i), determined that Petitioners' application for confidential treatment should be denied and Petitioners were sent a letter to that effect on July 23, 1976. Pursuant to 17 CFR 201.26, Petitioners petitioned the Commission for review of the Division of Market Regulation's denial of its application for confidential treatment; the Commission has granted their Petition for review.

The Commission has determined that the information for which confidential treatment has been sought -- viz., the names of the issuers for whom Petitioners act as transfer agents -- is in fact readily ascertainable from available sources (other than Petitioners) which show the transfer agents for publicly traded securities. The record also shows that Petitioners' original request for confidential treatment did not meet procedural requirements, in that Petitioners did not physically segregate the information for which confidentiality was requested and did not, in our judgment, offer a sufficient discussion of the grounds and justification for an exemption from disclosure.

IT IS ORDERED that application for confidential treatment under Section 24(b) of the Securities Exchange Act of 1934, as amended, be denied on the grounds that (i) Petitioners have failed to demonstrate that the information at issue constitutes trade secrets or privileged or confidential commercial information exempt from disclosure, or information otherwise exempt from disclosure, pursuant to the Freedom of Information Act (5 U.S.C. 552(b)), Section 24 of the Securities Exchange Act of 1934, and the Commission's rules concerning disclosure of records, 17 CFR 200.80(b); and (ii) Petitioners have failed to conform to the procedures specified under Rule 24b-2, 17 CFR 240.24b-2.

By the Commission.



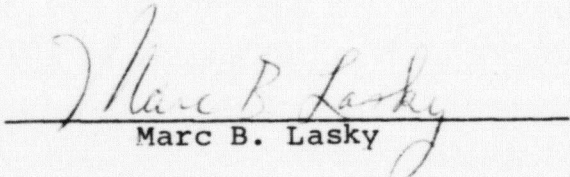
George A. Fitzsimmons
Secretary

CERTIFICATE OF SERVICE

The foregoing document has been served upon counsel for the Respondent by depositing copies of same enclosed in post-paid envelopes in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York. Said envelopes were addressed as follows:

Office of General Counsel
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Philip N. Lee, Esq.
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549



Marc B. Lasky

Dated: February 22, 1977